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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BRENT BEALS,

Petitioner,

v.

KIEWIT PACIFIC COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

QUESTION PRESENTED

Does federal law preempt state law when an independent employment contract is breached if the employee's job is covered by a collective bargaining agreement?

The Ninth Circuit Court of Appeals held that such a state law contract claim was preempted by federal law. The Third and Eighth Circuit Courts of Appeals disagree, having upheld similar state law claims against efforts to preempt them.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Beals respectfully requests that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit filed on June 4, 1997, to resolve the direct conflict between the Ninth Circuit and the Third and Eighth Circuits on the scope of federal labor law preemption of state law claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is a published opinion of the Ninth Circuit Court of Appeals filed on June 4, 1997. The opinion is set forth in the Appendix beginning at A-1.

Petitioner timely filed a Petition For Rehearing With Suggestion of En Banc Consideration which was denied by an

unpublished order of the Ninth Circuit Court of Appeals filed on July 17, 1997. The order is set forth in the Appendix at A-10.

JURISDICTION

On August 4, 1995, the United States District Court for the District of Hawaii entered an Amended Judgment In A Civil Case in favor of the plaintiff, Mr. Beals. A-11.

Mr. Beals filed a timely appeal, and Kiewit filed a timely cross-appeal in the Ninth Circuit Court of Appeals.

The Ninth Circuit filed its opinion on the appeal and cross-appeal on June 4, 1997. Mr. Beals timely filed a petition for rehearing with suggestion for

rehearing en banc. The Ninth Circuit Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing en banc by an order filed on July 17, 1997. A-10. Pursuant to Supreme Court Rule 13.1 this petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

29 U.S.C. §185(a), §301(a) of the Labor-Management Relations Act of 1947, provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Beals adopts the Ninth Circuit Court of Appeal's summary of facts as set forth in its decision and quoted below with petitioner's additions set forth in bold print:

Brent Beals sued his former employer, Kiewit Pacific Company ["Kiewit"], and won a jury verdict on his state law claims for breach of contract and negligent misrepresentation. **[The Ninth Circuit]** a f f i r m **[e d]** on the negligent misrepresentation claim but reverse **[d]** on the breach of contract claim on the ground that the contract claim was preempted.

Brent Beals was working full-time as a concrete pump operator for Merli Concrete Company in Southern California when Stuart Stephens of Kiewit Pacific Company

offered him a job as a concrete pumper on Kiewit's Honolulu airport project. Stephens informed Beals that the airport project would entail an "enormous" amount of overtime and that it would last at least two years. Stephens then faxed Beals a "move letter" that described Beals' position as a forklift/pump operator, agreed to employ Beals for the duration of the project, and promised to pay Beals a weekly subsistence allowance and moving expenses in addition to his hourly wage. The move letter stated that similar terms were offered only to a few select individuals and requested that Beals keep the terms confidential. Beals signed the move letter on February 13, 1991. **He moved to Honolulu and began work on the project on February 21, 1991.**

At the time that Beals signed the move letter, Kiewit already had a collective

bargaining agreement (CBA) with Operating Engineers Local Union No. 3 ("Local 3") that covered the position of forklift/pump operator. **The CBA excluded from its coverage managers, supervisors, estimators, office personnel, "confidential employees" and certain other types of specifically identified employees.** The CBA permitted Kiewit to discharge employees for reduction in force and "just cause". The CBA also provided an hourly wage schedule that was lower than the hourly wage promised in Beals' move letter **and would pay no subsistence or moving expenses to Beals. Eight days after Beals had begun working on the project, Stephens took him to the union office to affiliate with Local 3. Beals only then learned that the CBA provided less favorable terms than his move letter.** Kiewit, however,

assured Beals that it would adhere to the terms of the move letter regardless of the CBA, and Kiewit continued to pay Beals his wages and subsistence according to the terms of the move letter.

After five weeks at Kiewit, Beals was assigned to a steel worker's job instead of a forklift/pump operator position. **The steel worker's job was not covered by the Local 3 CBA.** Beals was terminated on July 26, 1991, five months after he had been hired. In terminating Beals, Kiewit complied with the requirements of the CBA.

Beals filed suit against Kiewit alleging breach of contract, fraudulent and negligent misrepresentation, tortious breach of contract, and two violations of the California Labor Code. The district court twice denied Kiewit's motions for summary

judgment on the ground that Beals' claims were not preempted by federal labor law. DC 03/20/92, 11/04/92 Opns. The district court reasoned that Beals' claims fell outside the CBA because they involved an individual employment contract negotiated before Beals arrived in Hawaii and before he became a member of Local 3, and because Beals' claims did not substantially depend upon an interpretation of the terms of the CBA. DC 03/20/92 On at 9-10; DC 11/04/92 On at 3-4. The district court also granted Kiewit summary judgment on the tortious breach of contract claim. DC 06/28/93 On.

The jury returned a verdict for Beals on his claims of breach of contract as to duration of employment, and negligent misrepresentation as to duration and nature of employment, awarding Beals $93,019 and $121,734, respectively. Kiewit filed a

motion to amend the judgment on the ground that it was duplicative, and the district court granted the motion by forcing Beals to choose one of the two awards. DC 05/17/94 On.

Mr. Beals appealed the district court's order granting summary judgment for Kiewit on the tortious breach of contract claim and the order granting the motion to amend the judgment. Based principally on preemption Kiewit cross-appealed the two denials of its motions for summary judgment.

REASONS FOR GRANTING THE WRIT

The Petition Should Be Granted Because The Ninth Circuit Has Created Conflict Among The Circuits In An Area Where National Uniformity Is Important By Extending Federal Labor Law Preemption To A Cause Of Action Properly Left To State Law

The Ninth Circuit Court Of Appeals' opinion in the instant case extends federal labor law preemption to every contract dispute between an employer and employee if the position at issue is covered by a collective bargaining agreement. The Ninth Circuit would preempt even in cases where the legal rights sought to be enforced arise independently of any collective bargaining agreement and can be resolved without substantial interpretation of any collective bargaining agreement. In so doing the Ninth Circuit has created direct conflict with the Third and Eighth Circuit Courts of Appeal in an area where national uniformity is

essential to the federal scheme favoring collective bargaining. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

The Ninth Circuit found that Mr. Beals' independent employment contract entered into before he was part of the labor unit covered by an existing collective bargaining agreement with Kiewit and which Kiewit adhered to throughout Mr. Beals' employment was "superseded" by an existing collective bargaining agreement. A-6. The Ninth Circuit reasoned that any independent employment contract "concerning a job position covered by the CBA" could be effective only as part of the collective bargaining agreement. *Id.*

The Ninth Circuit relied upon a trio of its decisions in formulating its

opinion: principally *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); as well as *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) and *Stallop v. Kaiser Foundation Hospital*, 820 F.2d 1044 (9th Cir. 1987).

The Ninth Circuit distinguished its decision in the instant case from the Court's *Caterpillar Inc., v. Williams*, 482 U.S. 386 (1987), opinion by finding that unlike the Beals' contract the individual employment contract in *Caterpillar* was "negotiated for a position *not* covered by the CBA at a time when the employee was *not* covered by the CBA" (emphasis in the original).

1. **THIRD CIRCUIT, *Berda v. CBS*, 881 F.2d 20 (3rd Cir. 1989).**

Berda closely parallels the instant

case factually. As in the instant case a skilled worker was induced to leave a steady job and employer for a job with a different employer in another state. 881 F.2d at 21. As in the instant case the proffered job was for a position covered by an existing CBA, and as in the instant case Berda was not affiliated with the employer's union at the time of the job offer and acceptance. *Id.* As in the instant case Berda's independent employment contract included some terms, namely terms governing job security, more favorable than similar terms in the CBA. *Id.* As in the instant case Berda's independent employment contract was partially performed before Berda affiliated with the union. *Id.* Five months later, exactly as long as in Mr. Beals' case, the employer breached the independent contract, terminating Berda in accordance with the CBA's provisions. *Id.*

However, unlike the Ninth Circuit in

the instant case, the Third Circuit rejected the employer's argument that because the employee's position was covered by the CBA the independent contract was governed by an existing CBA. *Id.* at 25 and 26. Relying on *Caterpillar*, the Third Circuit court held that Berda's state law breach of contract claims were not preempted because claims "premised on pre-employment agreements that are advantageous to the employee" are saved from preemption. *Id.* at 26. The *Berda* court also concluded that such claims are "not substantially dependent on interpretation of the collective bargaining agreement under *Caterpillar*..." *Id.* The *Berda* court noted that any of its prior decisions holding otherwise do "not survive *Caterpillar*." *Id.*, fn.7.

In its opinion the *Berda* court reviewed the Court's *Caterpillar* analysis, pointing out that the *Caterpillar* Court had revisited

the decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The *Berda* court noted that the *Caterpillar* Court's analysis had relied in part on the distinction drawn in *Case* between independent contracts which are more advantageous to the employee than the applicable CBA and independent contracts which are less advantageous. 881 F.2d at 24.

The *Berda* court specifically noted *Caterpillar's* rejection of the *Case*-based argument, apparently given new life by the Ninth Circuit's published decision in this case, that independent pre-employment contracts are necessarily subsumed in subsequent collective bargaining agreements. "Individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." *Id.* at 24 (quoting *Caterpillar*, 107 S.Ct. at 2431). The *Berda*

court further quoted *Caterpillar*, "the employer's basic error was 'its failure to recognize that an employee covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement'." *Id.* (quoting *Caterpillar*, 107 S.Ct. at 2431-32)(emphasis in original).

The Ninth Circuit's decision in the instant case is in direct conflict with the Third Circuit's *Berda* decision. The Ninth Circuit relied upon *Olguin* and its progeny. *Olguin* and its progeny rely in turn upon *Case* for their central propositions that a collective bargaining agreement controls any independent contract's inconsistent terms. 740 F.2d at 1474. But the Ninth Circuit's *Olguin* proposition ought not have survived *Caterpillar*. As the Third Circuit has

opined, an independent employment contract entered into by an employee not a member of the bargaining unit which provides terms more advantageous to the employee than an applicable CBA is not superseded by the CBA even if the contract's job position happens to be covered by the CBA particularly where the claims arising from the independent contract do not require substantial interpretation of the CBA.

2. **EIGHTH CIRCUIT, *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986).**

The Eighth Circuit's *Anderson* decision also conflicts directly with the Ninth Circuit's decision in the instant case.

In *Anderson* the union and Ford agreed that several hundred new hires needed for a production increase at Ford's St. Paul plant would come from the "preferential" hiring

list, a common CBA device consisting of a list of union workers recently laid off from other Ford plants around the country. Ford, however, also hired numerous former Ford union workers who were not on the preferential hiring list because they had been laid off for too long a period of time. These other hires were subsequently terminated, replaced by persons from the preferential hiring list. The laid off workers then sued under state common law claiming Ford breached their individual contracts and had made actionable misrepresentations.

The *Anderson* Court ruled against preemption, expressly noting that the Ninth Circuit had reached a different result in *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986), on somewhat similar facts. 803 F.2d at 958. The Eighth Circuit's reasoning differed from the Ninth Circuit's

in two respects.

Firstly, the *Anderson* Court found it "significant that these [state-law contract] claims are based on representations Ford allegedly made before the time appellants became employees of the company, that is, before the time they were even covered by the collective bargaining agreement." 803 F.2d at 957-58. This timing of competing contracts apparently led the *Anderson* court to conclude:

> Appellants are seeking to establish hiring contracts created by *Ford*'s alleged offers of permanent-status employment separate from the collective bargaining agreement. It is clear that the appellants' contractual and quasi-contractual claims do not originate in, nor refer in any substantial way to, the rights and duties established in the collective bargaining agreement.

Id. at 958

Thus, the *Anderson* Court's analysis mirrors the analysis of the two district court judges in this case who reasoned

similarly based in part on the timing of contract formation.

Secondly, the *Anderson* court's preemption inquiries were (1) whether the claims at issue derived from the CBA and (2) whether evaluation of those claims required extensive interpretation of the CBA's terms. *Id.* at 956 (citing *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). The *Anderson* Court measured the essential elements of the asserted claims against those yardsticks.

The Ninth Circuit's decision in the instant case conflicts with the Eighth Circuit's *Anderson* decision. The Ninth Circuit eschewed the Eighth Circuit's preemption inquiries. The Ninth Circuit ignored the timing of the Beals' contract formation. The Ninth Circuit never evaluated the origin of the Beals' contract claim. Rather than making the Eighth Circuit's preemption inquiries the Ninth

Circuit focused solely on whether Beals' forklift/pump operator's position was covered by the CBA.

3. **Another Pertinent Case.**

The Fourth Circuit's decision, *White v. National Steel Corp.*, 938 F.2d 474 (4th Cir. 1991), is in substantial conflict with the Ninth Circuit's decision in the instant case because the employer in *White* raised the same argument as the Ninth Circuit found persuasive, namely that "if the subject matter of the contract is a position in the collective bargaining unit, then the [independent] contract cannot contain terms inconsistent with those contained in the collective bargaining agreement." *Id.* at 484 (citing *Case, supra; Ulrich v. Goodyear Tire & Rubber Co.*, 884 F.2d 936, 938 (6th Cir. 1989); *Darden v. U.S. Steel Corp.*, 830 F.2d 1116, 1120 (11th Cir. 1987); *Eitmann v.*

New Orleans Pub. Serv., Inc., 730 F.2d 359, 364 (5th Cir. 1984).

In *dicta*, the Fourth Circuit rejected that argument, focusing its analysis instead on the source of the asserted right. 938 F.2d at 483. The Fourth Circuit then weighed whether allowing the employees' state law claims to be adjudicated would "compromise any principles of federal labor law" and concluded there was no threat to federal interests. *Id.* at 486.

Moreover, the *White* employees, like Mr. Beals, sought merely damages, which the Court had already held were recoverable for a breach of an independent contract under state law even if the independent contract could not be specifically enforced on account of subsequent federal labor agreements. *Id.* at 485 (citing *Belknap Inc., v. Hale*, 463 U.S. 491 (1983). Thus the Fourth Circuit found no basis for preemption.

CONCLUSION

The petitioner respectfully requests a writ issue in this case to resolve the conflict between the circuit courts of appeals on this important federal issue.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENT BEALS, *Plaintiff-Appellant,* v. KIEWIT PACIFIC COMPANY, INC., *Defendant-Appellee.*	No. 95-16689 D.C. No. CV-91-00471-DAE
BRENT BEALS, *Plaintiff-Appellant-Cross-Appellee,* v. KIEWIT PACIFIC COMPANY, INC., *Defendant-Appellee-Cross-Appellant.*	No. 95-16844 D.C. No. CV-91-00471-DAE OPINION

Appeals from the United States District Court
for the District of Hawaii
David Alan Ezra, District Judge, Presiding

Argued and Submitted
May 5, 1997—Honolulu, Hawaii

Filed June 4, 1997

Before: William A. Norris, Cynthia Holcomb Hall,
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Labor and Employment/ Collective Bargaining Agreements

The court of appeals reversed in part a judgment of the district court, and affirmed in part. The court held that the Labor Management Relations Act (LMRA) preempts a breach of contract claim based on an independent employment contract for a position covered by a collective bargaining agreement (CBA).

Appellee Kiewit Pacific Company offered appellant Brent Beals a job on a construction project in Hawaii. Kiewit and Beals signed a "move letter" that described Beals's position as a forklift/pump operator. Kiewit agreed to employ Beals for the duration of the project and promised to pay him specified wages.

Kiewit already had a CBA that covered that position. The CBA permitted Kiewit to discharge employees for lack of work and just cause; and it provided an hourly wage schedule that was lower than the wage promised Beals.

After being transferred to another position, Beals was discharged before the project ended. Beals sued Kiewit, alleging breach of contract as to the duration of employment; negligent misrepresentation as to the duration and nature of employment; and tortious breach of contract. Kiewit moved for summary judgment on the ground that the claims were preempted by federal labor law. The district court granted summary judgment only on the tortious breach of contract claim.

A jury returned a verdict for Beals on the breach of contract and negligent misrepresentations claims. The court amended the judgment, forcing Beals to choose one of the two awards. Kiewit and Beals cross-appealed.

[1] The LMRA preempts state law claims that are based directly on rights created by a CBA as well as claims that are substantially dependent on an interpretation of a CBA. [2] Any independent agreement of employment concerning a job position covered by a CBA can be effective only as part of the CBA. The position Beals was hired to fill was covered by the CBA. The CBA controlled and any claims seeking to enforce the terms of the move letter were preempted.

[3] The Supreme Court case relied on by the district court addressed an individual employment contract negotiated for a position *not* covered by the CBA, at a time when the employee was *not* covered by the CBA. That case did not apply.

[4] To prove negligent misrepresentation under Hawaii law, Beals had to show that Kiewit failed to use reasonable care in communicating false information to him and that he justifiably relied on that information. Beals did not contest that he could have been discharged under the CBA. The question whether he knew about the provisions of the CBA would not require a court to construe any terms in the CBA because no relevant provisions were disputed. Beals's negligent misrepresentations claim was not preempted.

COUNSEL

Lunsford Dole Phillips, Honolulu, Hawaii, for plaintiff-appellant-cross-appellee Brent Beals.

Charles W. Gall and Nathan Yoshimoto, Kobayashi, Sugita & Goda, Honolulu, Hawaii, for defendant-appellee-cross-appellant Kiewit Pacific Company, Inc.

OPINION

NORRIS, Circuit Judge:

Brent Beals sued his former employer, Kiewit Pacific Company, and won a jury verdict on his state law claims for breach of contract and negligent misrepresentation. We affirm on the negligent misrepresentation claim but reverse on the breach of contract claim on the ground that the contract claim is preempted.

I

Brent Beals was working full-time as a concrete pump operator for Merli Concrete Company in Southern California when Stuart Stephens of Kiewit Pacific Company (Kiewit) offered him a job as a concrete pumper on Kiewit's Honolulu airport project. Stephens informed Beals that the airport project would entail an "enormous" amount of overtime and that it would last at least two years. Stephens then faxed Beals a "move letter" that described Beals' position as a forklift/pump operator, agreed to employ Beals for the duration of the project, and promised to pay Beals a weekly subsistence allowance and moving expenses in addition to his hourly wage. The move letter stated that similar terms were offered only to a few select individuals and requested that Beals keep the terms confidential. Beals signed the move letter on February 13, 1991.

At the time that Beals signed the move letter, Kiewit already had a collective bargaining agreement (CBA) with Operating Engineers Local Union No. 3 (Local 3) that covered the position of forklift/pump operator. The CBA permitted Kiewit to discharge employees for reduction in force and "just cause." The CBA also provided an hourly wage schedule that was lower than the hourly wage promised in Beals' move letter. Kiewit, however, assured Beals that it would adhere to the terms of the move letter regardless of the CBA, and

Kiewit continued to pay Beals his wages and subsistence according to the terms of the move letter.

After five weeks at Kiewit, Beals was assigned to a steel worker's job instead of a forklift/pump operator position. Beals was terminated on July 26, 1991, five months after he had been hired. In terminating Beals, Kiewit complied with the requirements of the CBA.

Beals filed suit against Kiewit alleging breach of contract, fraudulent and negligent misrepresentation, tortious breach of contract, and two violations of the California Labor Code. The district court twice denied Kiewit's motions for summary judgment on the ground that Beals' claims were not pre-empted by federal labor law. DC 3/20/92, 11/4/92 Opns. The district court reasoned that Beals' claims fell outside the CBA because they involved an individual employment contract negotiated before Beals arrived in Hawaii and before he became a member of Local 3, and because Beals' claims did not substantially depend upon an interpretation of the terms of the CBA. DC 3/20/92 Opn at 9-10; DC 11/4/92 Opn at 3-4. The district court also granted Kiewit summary judgment on the tortious breach of contract claim. DC 6/28/93 Opn.

The jury returned a verdict for Beals on his claims of breach of contract as to duration of employment, and negligent misrepresentation as to duration and nature of employment, awarding Beals $93,019 and $121,734, respectively. Kiewit filed a motion to amend the judgment on the ground that it was duplicative, and the district court granted the motion by forcing Beals to choose one of the two awards. DC 5/17/94 Opn.

Beals appeals the district court's order granting Kiewit's motion to amend the judgment and its order granting summary judgment in favor of Kiewit on the tortious breach of contract claim. Kiewit cross-appeals the district court's denial of summary judgment on the preemption issue.

II

[1] Section 301 of the Labor Management Relations Act (LMRA) preempts state law claims that are based directly on rights created by a collective bargaining agreement as well as claims that are substantially dependent on an interpretation of a collective bargaining agreement. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987). Kiewit argues that Beals' breach of contract and negligent misrepresentation claims are preempted by § 301 because resolution of those claims requires an interpretation of the terms of the CBA. Kiewit also argues that the breach of contract claim is preempted because the move letter on which it is based is superseded by the CBA. Beals responds that neither the breach of contract nor the negligent misrepresentation claim requires an interpretation of the terms of the CBA because those terms are not disputed.

A

[2] Kiewit is correct that the move letter is superseded by the CBA because any "independent agreement of employment [concerning a job position covered by the CBA] could be effective only as part of the collective bargaining agreement." *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1474 (9th Cir. 1984); *see also Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987); *Stallcop v. Kaiser Found. Hosp.*, 820 F.2d 1044, 1048 (9th Cir. 1987). Moreover, "[t]o the extent that the [independent agreement] is inconsistent with the provisions of the collection [sic] bargaining agreement, the bargaining agreement controls." *Olguin*, 740 F.2d at 1474. Since the parties do not dispute that the position Beals was hired to fill — that of forklift/pump operator — was covered by the CBA, the CBA controls and any claims seeking to enforce the terms of the move letter are preempted.

[3] The district court relied on *Caterpillar*, 482 U.S. at 386, to hold that Beals' move letter was independent of the CBA. DC 3/20/92 Opn at 8-9. *Caterpillar* does state that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." *Caterpillar*, 482 U.S. at 396. However, *Caterpillar* makes this statement in the context of addressing an individual employment contract negotiated for a position *not* covered by the CBA, at a time when the employee was *not* covered by the CBA. *See Young*, 830 F.2d at 998-99 (distinguishing *Caterpillar* because *Caterpillar* involved breach of contract claim concerning job not governed by CBA); *Stallcop*, 820 F.2d at 1048-49 (same). Thus, *Caterpillar* does not apply to exempt Beals' breach of contract claim from § 301 preemption.[1]

B

[4] Whether Beals' negligent misrepresentation claim is also preempted by § 301 depends on whether resolution of that claim would require an interpretation of the terms of the CBA. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 411 (1988). To prove negligent misrepresentation under Hawaii law, Beals must show that (1) Kiewit failed to exercise reasonable care in communicating false information to Beals; and (2) Beals justifiably relied on that information. *See Bronster v. United States Steel Corp.*, 919 P.2d 294 (Haw. 1996). Kiewit argues that the second prong requires an inter-

[1]For the same reason that Beals' breach of contract claim is preempted, his tortious breach of contract claim is also preempted. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (state tort claim preempted where resolution of claim implicates implied good faith provision of labor contract). Therefore, we need not address whether *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), prohibits such a cause of action. Moreover, since we hold that Beals' breach of contract claim is preempted, we need not address whether the damages awarded on the breach of contract claim are duplicative of the damages for the negligent misrepresentation claim.

pretation of the terms of the CBA because whether Beals' reliance was justifiable depends on whether Beals should have known that the CBA permitted Kiewit to terminate him at any time for lack of work. We disagree. Beals does not contest that he could have been discharged for lack of work under the CBA. Indeed, Kiewit concedes that its right to terminate Beals at any time under the CBA is "undisputed." *See* Defendant's Reply Br. at 1. Thus, the question whether Beals knew about the provisions of the CBA would not require a court to construe any terms in the CBA because no relevant provisions are disputed. Since none of the terms of the CBA relevant to Beals' negligent misrepresentation claim is subject to conflicting meanings, resolution of that claim will not contravene the policy behind § 301 preemption "to ensure uniform interpretation of collective-bargaining agreements," *Lingle*, 486 U.S. at 404. Therefore, Beals' negligent misrepresentations claim is not preempted by § 301.

Although Kiewit does not cite these cases, we note that *Bale v. General Tel. Co.*, 795 F.2d 775 (9th Cir. 1986), *Stallcop*, 820 F.2d at 1044, and *Young*, 830 F.2d at 993, do not dictate a contrary result. *Bale* held that the plaintiffs' negligent misrepresentation claims were preempted because resolution of the claims would require the plaintiffs to show that the terms of their collective bargaining agreement differed significantly from the terms of their individual employment contracts. Without further elaboration on the facts, *Bale* reasoned that the negligent misrepresentation claims were therefore substantially dependent upon an analysis of the terms of the collective bargaining agreement. *Bale*, 795 F.2d at 780. *Stallcop* and *Young* merely cited *Bale* without additional analysis. We can only conclude from *Bale*'s cursory treatment of the issue that the misrepresentation claims in *Bale*, as well as those in *Stallcop* and *Young*, involved disputed terms of a labor contract. In contrast, Beals and Kiewit do not dispute the meaning of any of the relevant provisions of the CBA, so comparison of the terms of the CBA to

Kiewit's oral representations does not require an interpretation of the terms of the CBA.

CONCLUSION

Accordingly, the judgment is REVERSED to the extent that it awards $93,019 to Beals on his breach of contract claim and AFFIRMED to the extent it awards Beals $121,734 on his negligent misrepresentation claim. Each side shall bear his or its own costs on appeal.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 17 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BRENT BEALS, Plaintiff-Appellant v. KIEWIT PACIFIC COMPANY, INC., Defendant-Appellee	No. 95-16689 D.C. No. 91-00471-DAE
BRENT BEALS, Plaintiff-Appellee/ Cross-Appellant v. KIEWIT PACIFIC COMPANY, INC., Defendant-Appellant/ Cross-Appellee.	No. 95-16844 D.C. No. 91-00471-DAE O R D E R

Before: NORRIS, HALL, TASHIMA, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Hall and Tashima have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

AO 450 Rev. 5/85 Judgment in a Civil Case

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

AUG 4 1995

at ___ o'clock and ___ min. ___M

WALTER A. H. Y. CHINN, CLERK

UNITED STATES DISTRICT COURT

District of Hawaii

AMENDED

JUDGMENT IN A CIVIL CASE

BRENT BEALS

V.

KIEWIT PACIFIC CO.

Case Number: CIVIL NO. 91-00471DAE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that an Amended Final Judgment is hereby entered in favor of Plaintiff and against Defendant in the amount of $175,661.51.

cc: all parties

AUG 4 1995

Date

WALTER A.Y.H. CHINN

Clerk

(By) Deputy Clerk

Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-782

In The

Supreme Court of the United States

October Term, 1997

BRENT BEALS,

Petitioner,

v.

KIEWIT PACIFIC COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KOBAYASHI, SUGITA & GODA

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27 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held that an employee whose employment was covered under the terms of a collective bargaining agreement could not assert a breach of contract claim based on Hawaii state law against his former employer because Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), preempts such a claim, as adjudication of the claim substantially depended on an interpretation of the collective bargaining agreement and the contract upon which the employee based his claim was subsumed by the collective bargaining agreement.

LIST OF INTERESTED PARTIES

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kiewit Pacific Co. discloses as follows: Respondent Kiewit Pacific Co.'s parent company is Kiewit Construction Company. Respondent Kiewit Pacific Co. does not have any nonwholly owned subsidiaries.

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JURISDICTION

This case was docketed on November 10, 1997. Pursuant to Rule 30.4 of the Rules of the Supreme Court of the United States ("Rules"), an application to extend time to file this Brief in Opposition and other documents under the Rules was made on December 2, 1997. The Clerk of the Court extended the time to file the Brief in Opposition and other documents under the Rules until January 9, 1998. The Brief in Opposition, accordingly, is timely filed.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth in the United States Court of Appeals for the Ninth Circuit's opinion. *Beals v. Kiewit Pacific Co.*, 114 F.3d 892 (9th Cir. 1997). Respondent, however, disputes the following additional "facts" that are set forth in Petitioner's Petition for Writ of Certiorari ("Petition"). In particular, the additional "facts" are irrelevant to the Court's consideration of the issue involved in this case.

1. Whether the collective bargaining agreement ("CBA") excluded from its scope of coverage certain "confidential employees" is irrelevant. *See* Petition at 6. Petitioner appears to make much of the disputed fact that he was told to keep the terms of the "move letter" "confidential," and that this request made him a "confidential employee." Petitioner is wrong and he was never a "confidential employee" who was excluded from coverage under the CBA. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981); *B.F. Goodrich Co.*,

115 N.L.R.B. 722 (1956) (defining "confidential employees" as persons "who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations").

2. The CBA did not provide "less favorable terms" than the "move letter." Petition at 6. In fact, the CBA provided significantly more benefits and protections to covered employees like Petitioner, such as employer contributions to the various multiemployer benefit and pension plans, hours of work, overtime, holidays, job referrals and job placement, and, of course, the grievance and arbitration mechanism to resolve disputes such as those involved in this case. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 15-17, 21-25, 29, 41-42; Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 10-16.

3. Petitioner was not placed in a position that was not covered by the CBA. Petition at 7. At all times during his employment he was in a position that was covered by the Operating Engineers' CBA. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 148-153; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 87-88, 93-94, 114.

ARGUMENT

I. Summary of Argument

Petitioner frames the issue before the Court as being whether the preemption analysis in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), requires the reversal of the Ninth Circuit's opinion that Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) ("§ 301"), preempts a state law contract claim when the alleged independent employment contract is breached and the employee's job is covered by a CBA. Petitioner misstates the United States Court of Appeals for the Ninth Circuit's holding. Instead, the Ninth Circuit, consistent with this Court's decisions, correctly held that Petitioner's state contract claim was preempted by § 301 because his claim substantially depended on an interpretation of the CBA and the "independent agreement" that Petitioner sought to enforce against Respondent was subsumed by the labor agreement. *Beals*, 114 F.3d at 894.

The Ninth Circuit's opinion is consistent with this Court's decisions and with the decisions of the Courts of Appeals for other circuits. The cases upon which Petitioner relies to establish a "conflict among the circuits" are factually distinguishable and, accordingly, reliance on these cases is misplaced. There is no basis for this Court to grant certiorari review.

II. The United States Court Of Appeals For The Ninth Circuit's Decision Is Consistent With This Court's Decisions.

Petitioner relies solely on the *Caterpillar* decision to support his argument that the Ninth Circuit's decision in this case should be reviewed on certiorari. However, there is no basis to grant certiorari because the Ninth Circuit correctly concluded that this case and *Caterpillar* are factually dissimilar and that the holding in *Caterpillar* is not controlling. *Beals*, 114 F.3d at 894-95.

In *Caterpillar*, at the time that the employer made promises of long-term managerial employment to the aggrieved employees, the employees were not covered by a CBA; they were managerial employees who were not members of a recognized bargaining unit and whose positions were not covered by the CBA. *Caterpillar*, 482 U.S. at 388. The employer subsequently downgraded the employees to positions that were covered by the CBA and eventually laid them off. *Id.*

After their employment terminations, the employees sought to enforce in California state court the employer's oral and written representations to each of them that they as managerial employees could look forward to "indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them." *Id.* at 389 (citations and quotation marks omitted). Under California law, such affirmative representations and promises are enforceable against the employer. *Id.* at 389, n.2.

The critical question before the Court was "whether [the employees'] state-law complaint for breach of individual employment contracts [was] completely pre-empted by § 301 of the Labor Management Relations Act, . . . and therefore removable to Federal District Court." *Id.* at 388. The Court's primary concern was the preemptive scope of § 301 so as to give rise to removal jurisdiction.

In analyzing the "complete preemption" issue, the Court focused on, among other things, whether a defendant could remove a case to federal court based on the assertion of a federal defense. *Id.* at 393. The Court held that "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 399. The Court concluded that because adjudication of the state contract claim did not require interpretation of the CBA, and because the rights that the employees were seeking to vindicate were independent of any CBA, there was no basis to invoke the "complete preemption" doctrine so as to give rise to federal removal jurisdiction. *Id.*

The Court noted that adjudication of the employees' state "implied contract of employment" claim, predicated on *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327-329 (1981), and *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455-456 (1980), did not require interpretation of the CBA. Under *Pugh* and *Cleary*, the trier of fact, when faced with a California state law "implied contract of employment" claim, would have to examine a "combination of factors, including longevity of service,

commendations and promotions, oral and written assurances of stable and continuous employment, and an employer's personnel practices." *Caterpillar*, 482 U.S. at 389, n.2. Consideration of the *Pugh* "factors" was independent of any provision of the CBA and did not "substantially depend" on an interpretation of the CBA, as the representations related to management positions not covered by the CBA.

In contrast, the factual and legal issues presented in this case are markedly different from the issues that were addressed in *Caterpillar*. Here, the adjudication of Petitioner's state contract claim is substantially dependent on an interpretation of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). Petitioner sought to enforce an alleged express contract of employment for a definite duration. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 143. Under Hawaii law, a contract of employment for a definite duration can only be terminated "for cause." *See Vieira v. Robert's Hawaii Tours, Inc.*, 2 Haw. App. 237, 630 P.2d 120 (1981). Pursuant to the CBA at issue, Respondent had the right to terminate covered employees like Petitioner for "just cause" and/or for "lack of work." Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 11, 29. Accordingly, whether or not Petitioner articulated a cognizable and viable claim for breach of the "move letter" would require the trier of fact to interpret the CBA's "just cause/lack of work" provision in order to determine whether a breach of the "move letter" occurred in the first instance.

This Court has consistently held that in the context of federal labor law, the arbitrator appointed by labor and

management under the grievance procedures set forth in a CBA has the power and authority to interpret and apply the terms of that agreement, including the issue of whether "just cause" exists to terminate a covered employee's employment consistent with the terms of the CBA. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 1031 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Here, consistent with the decisions of this Court, the Ninth Circuit correctly concluded that adjudication of Petitioner's state contract claim substantially depended on an interpretation of the CBA, and accordingly, was preempted by § 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

Furthermore, the "implied contract of employment" claim at issue in *Caterpillar* required consideration of the *Pugh* factors to determine whether the aggrieved employees asserted a cognizable claim under California law. Adjudication of the *Pugh* factors in *Caterpillar* did not require an interpretation of the CBA at issue in that case, and consideration of such factors was held to be independent of the CBA, as the representations related to positions that were not covered by the CBA. Here, on the other hand, Petitioner did not assert an "implied contract of employment" claim predicated on the *Pugh* factors. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 143. Indeed, the Hawaii Supreme Court has refused to recognize such an "implied contract of employment" claim based on *Pugh*. *Calleon v. Miyagi*, 76 Haw. 310, 876 P.2d 1278 (Haw. 1994). Instead, Petitioner asserted a breach of an express contract of employment for a definite duration, which required proof

that Respondent articulated reason to terminate Petitioner did not constitute "just cause." This is precisely the kind of issue that the arbitrator appointed pursuant to the grievance procedures of the CBA has the specialized knowledge, experience, and competence to adjudicate, and which requires an interpretation of the CBA. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Finally, Petitioner argues that the Ninth Circuit erred in concluding that the "move letter" was "subsumed" by the CBA. *See* Petition at 16-17. Respondent recognizes this Court's lesson in *Caterpillar* that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." *Caterpillar* 482 U.S. at 396, discussing *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). However, in this case, the "move letter," contrary to Petitioner's unsupported and conclusory factual statement that the "move letter" was "more advantageous" than the CBA, in fact "subtracted from" the rights and obligations under the CBA.

For example, the "move letter" does not address the requirement that all employers-signatories to the CBA must make contributions on behalf of covered employees like Petitioner to the various multiemployer plans, such as the Hawaii Health and Welfare Trust Fund for Operating Engineers, the Operating Engineers' Pension Trust Fund, the Pensioned Operating Engineers' Health and Welfare Trust Funds, the Hawaii Operating Engineers' Annuity Trust Fund, and the Operating Engineers' Vacation and Holiday Pay Plan. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 17-18.

Likewise, the "move letter" was silent as to the "Referral, Hiring and Employment" mechanism to ensure job placement and job referrals for terminated and/or laid-off Operating Engineers like Petitioner; the hours and overtime provisions and benefits (including meal periods, two-shift and three-shift operations and night work hours and benefits); and holidays. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 15-17, 21-25, 29, 41-42; Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 10-16. In addition, the "move letter" and the CBA contain inconsistent provisions regarding "subsistence and travel pay." *Compare* Section 18 of the CBA (Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 28-29) and Paragraph 2 of the Move Letter (Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94). Certainly, the "move letter" is silent as to the grievance mechanisms and procedural safeguards as provided in the CBA. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 21-25.

The Court instructed long ago in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a

> duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement . . . Individual contracts cannot subtract from collective ones. . . .

Id. at 337, 339. *See also Caterpillar*, 482 U.S. at 396.

In his Petition, Petitioner has not provided any meritorious analysis or argument based on this Court's prior decisions so as to justify the Court's exercise of its discretionary certiorari review power. The Ninth Circuit's decision in this case is entirely consistent with the Court's federal labor law jurisprudence. Certiorari review, accordingly, should be rejected.

III. There Is No "Conflict Among The Circuits" On Whether Claims Such As Petitioner's Are Preempted By The Labor Management Relations Act.

Petitioner is incorrect in arguing that the Ninth Circuit's decision is in conflict with decisions from the Third and Eighth Circuits. Petitioner relies on *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990), and *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), to support his argument. Both of these cases involve facts that are distinguishable from the facts in this case, and, as a result, require a different outcome from that of the Ninth Circuit's decision in *Beals*. In both *Berda* and *Anderson*, the employees sought to enforce narrow and limited pre-hire agreements that specifically addressed only the duration

or permanency of employment. Under these circumstances, the *Berda* and *Anderson* courts held that no interpretation of the CBA was necessary because the pre-hire agreements that were being enforced were of such limited and specific scope (relating only to the duration or permanency of employment) that there was no sufficient overlap with the CBA to require the CBA to be interpreted in order to determine the rights under the pre-hire agreements. In contrast, the "move letter" that Petitioner sought to enforce against Respondent addressed numerous different terms and conditions of employment, many of which were also covered by the CBA (if not inconsistent with the CBA) and was, therefore, so broad and overlapping with the CBA that enforcement of it was substantially dependent on an interpretation of the labor agreement.

In *Berda*, the aggrieved employee asserted that during a pre-employment meeting, the employer orally "guaranteed employment . . . for the reasonably foreseeable future, and that any job offered to him would . . . be a permanent position." *Id.* at 21. After accepting employment with the employer, the employee "was laid off as a part of a company-wide reduction in force." *Id.*

After being laid off, the employee filed a complaint in state court alleging, among other things, breach of an implied contract of employment/promissory estoppel. *Id.* The breach of an implied contract of employment/promissory estoppel claim was based on the alleged oral statement made during the pre-employment meeting on which the employee detrimentally relied. The employee claimed that when the statement was made at the meeting, the employer knew or should have known that the

company would be "conduct[ing] extensive layoffs in the department and division . . . in which he was eventually offered employment." *Id.*

In concluding that § 301 did not preempt the employee's implied contract/promissory estoppel claim, the *Berda* court noted that the employee's state law claim did not substantially depend on an interpretation of any provision in the CBA. *Id.* at 26. Indeed, no interpretation of the CBA was necessary because the agreement sought to be enforced was a specific and narrow promise related to the duration of employment. The "independent agreement" was not a broad agreement with substantial overlap with the CBA. In fact, the Third Circuit observed that in order to prove his breach of the implied contract of employment/promissory estoppel claim, the employee only needed to prove (1) that the representations that he would not be laid off were made, (2) that he relied on such representations, and (3) that the employer breached its promise when it laid the employee off. *Id.* at 25.

The *Berda* court critically commented that the employer's only defense to the employee's implied contract of employment/promissory estoppel claim was that alleged representations "related to" the "basic terms and conditions of [the employee's] employment," and that the alleged representations were "inconsistent with" the seniority and layoff provisions of the CBA. *Id.* Under these circumstances, the *Berda* court concluded that the employee's implied contract of employment/promissory estoppel claim did not require interpretation of any provision of the CBA and, accordingly, was not preempted by § 301.

In *Beals*, Petitioner did not assert an "implied contract of employment" or a "promissory estoppel" claim predicated on representations that were "independent" of the CBA. Petitioner's state law claim sounding in an alleged breach of an express contract of employment for a definite duration required consideration of the critical factual issue that Respondent did not have "just cause" to terminate him consistent with the CBA. Hence, adjudication of Petitioner's contract claim was substantially dependent on an interpretation of a fundamental provision set forth in the CBA. Furthermore, the terms and conditions of employment that Petitioner sought to enforce against Respondent as set forth in the "move letter" were far broader than the terms and conditions of employment that the employee in *Berda* was seeking to enforce against his employer. Adjudication of Petitioner's contract claim based on the "move letter," accordingly, required interpretation of the CBA and its provisions as it related to the provisions set forth in the "move letter."

Moreover, unlike *Berda*, where the alleged representations and promises were held to be "advantageous" to the employee, here, as discussed above, the "move letter" is silent as to crucial collective benefits, safeguards, and protections as provided in the CBA. As such, and consistent with *J.I. Case* and *Caterpillar*, the "move letter" was subsumed by the CBA, and any contract claim predicated on the "move letter" is preempted by federal labor law. The Ninth Circuit was correct in so concluding.

Petitioner also points to the Eighth Circuit's decision, *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), a two-to-one decision

that was decided *prior to Caterpillar*, to support his argument that there is a "conflict" among the federal appellate courts. Reliance on *Anderson* is misplaced. The employer in *Anderson*, pursuant to the CBA, began to hire laid-off employees from a preferential hiring list in order to meet an increase in production requirements. *Id.* at 954. In addition, the employer began to contact former employees who had been laid off three years earlier, but whose recall rights had expired given the length of time that they had been on layoff. *Id.* These employees were employed as new hires and placed on a 90-day probationary period consistent with the CBA in place with the union.

The probationary employees alleged that when they were contacted by the employer, the employer promised them that they would be hired as "permanent employees." *Id.* at 955. However, prior to the expiration of the probationary period, the employees "were 'bumped' from their jobs by employees from the preferential hiring list." *Id.* at 954-55. The probationary employees asserted state tort and contract claims against the employer. The employer removed the case to federal court based on the "complete preemption" doctrine, and successfully dismissed the probationary employees' complaint.

The Eighth Circuit reversed and concluded that because the probationary employees' contractual and quasi-contractual claims did not "originate in, nor refer in any substantial way to, the rights and duties established in the collective bargaining agreement," their state law claims were not preempted under § 301. *Id.* at 958. The *Anderson* court's decision is consistent with and dictated

by the limited and specific nature of the pre-hire agreement that the employees were seeking to enforce, which only addressed the permanency or duration of their employment. The *Anderson* court cited to *J.I. Case* in a footnote, and concluded that "individual contracts" that "[are] separate and distinct from a collective bargaining agreement can create legally enforceable rights and obligations." *Id.* at 958, n.7, citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336. Given the narrow breadth of the "contract" that the employees were seeking to enforce against the employer – the "permanent" duration of their employment – the *Anderson* court properly concluded that the rights that the employees were seeking to enforce against the employer did not require interpretation of the CBA, nor were such promises "subsumed" by the CBA.

On the other hand, in *Beals*, Petitioner sought to enforce the terms of the "move letter" that broadly addressed conditions of employment with Respondent, many of which were covered by, and, in some instances, were inconsistent with the CBA. The position for which Respondent hired Petitioner was a position that was covered by the CBA, and his employment terms and conditions were governed by the CBA at all times. As such, and given the breadth and overlap between the terms of the "move letter" and the CBA, the Ninth Circuit properly found that the "contractual rights" that Petitioner sought to enforce were substantially dependent on an interpretation of the CBA to determine whether or not his contract claim was cognizable and viable under Hawaii law. Moreover, as discussed above, under *J.I. Case*, the terms of the "move letter" significantly "subtracted from" the rights and obligations under the CBA and, in fact,

were inconsistent with the CBA. Thus, the Ninth Circuit was entirely correct in preempting Petitioner's state contract claim, and the Ninth Circuit's decision is consistent with the *Anderson* decision.

Finally, Petitioner identifies *White v. National Steel Corp.*, 938 F.2d 474 (4th Cir. 1991), *cert. denied*, 502 U.S. 974 (1991), as being "in substantial conflict with the Ninth Circuit's decision in the instant case." However, *White* is easily distinguishable from the instant case and is based on facts that are completely different from those presented in this case. The "independent contracts of employment" that the employees in *White* were seeking to enforce were management contracts: "The promises plaintiffs seek to enforce are those that [the employer] made to them in negotiations over the terms of employment in management positions." *Id.* at 483. As such, the employees "were not in positions covered by a collective agreement," and therefore, adjudication of their state contract claims did not substantially depend on an interpretation of the CBA. *Id.* at 484. Because the employees in *White* were hired for positions not covered by the CBA, no interpretation of the CBA could even be relevant. *White*, accordingly, does not support Petitioner's argument at all. Indeed, *White* is consistent with the Ninth Circuit's application of *Caterpillar* in this case.

The Ninth Circuit's decision in the instant case is also consistent with the Fifth Circuit and the Eleventh Circuit's decisions. In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984), *reh'g denied*, 738 F.2d 437, *cert. denied*, 469 U.S. 1018 (1984), the Fifth Circuit analyzed an aggrieved employee's state contract claim that is factually similar to Petitioner's. In *Eitmann*, prior

to being hired, the employee alleged that the employer "promised to keep [the employee] on the payroll at full compensation in the event of a disabling work-related injury." *Id.* at 361. During his employment, the employee was injured several times on the job. *Id.* After his latest injury, the employer terminated him, "advising him that it had no suitable work available that he was capable of performing." *Id.* "At all times during his employment . . . , [the employee] was a member of [a union] which maintained a collective bargaining agreement with [the employer]." *Id.*

The CBA in *Eitmann* contained provisions for the discharge of employees. *Id.* at 360-61. Further, the labor agreement contained provisions for the handling of grievances. *Id.* at 361. Notwithstanding these provisions in the CBA, the employee filed a breach of contract claim in state court based on the employer's alleged promise of continued employment. In response, the employer asserted that the employee's claim arose under § 301 of the LMRA, removed the action to federal district court, and successfully had the case dismissed after moving for summary judgment on the ground that the state contract claim was completely preempted by § 301. *Id.*

On appeal, the Fifth Circuit noted that the employee's breach of contract claim, "on its face, [did] not invoke the collective bargaining agreement." *Id.* at 362. However, the court observed that it was not convinced "that the two agreements [could] be construed so independently of each other," especially since the alleged oral contract essentially provided

> for lifetime employment, regardless of [the employee's] ability to perform any services for the employer; in other words, unlike all of the other employees covered by the collective bargaining agreement, [the employee] could not be discharged because of his physical inability to perform any services for [the employer]."

Id. at 362-63. The court concluded that the alleged oral contract clearly sought to "limit or condition the terms of the CBA, which established the terms and conditions of employment, including discharge," and thus held that the employee's breach of contract "action is necessarily preempted by § 301." *Id.* at 364.

Here, as in *Eitmann*, Petitioner alleged that prior to being hired, Respondent promised him employment in a covered position that would last two years. At all times during his employment with Respondent, Petitioner was a member of the Operating Engineers' union. As with the employee's claim in *Eitmann*, Petitioner's claim, "on its face, [did] not invoke the collective bargaining agreement." *Id.* at 362. Furthermore, as in *Eitmann*, Petitioner asserted that he was promised employment for a definite duration and that he would remain so employed regardless of the discharge provisions under the terms of the CBA. Under these circumstances, accordingly, the Ninth Circuit, consistent with *Eitmann*, was correct in preempting Petitioner's contract claim.

Likewise, the Eleventh Circuit's decision in *Darden v. U.S. Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987), is also in agreement with the Ninth Circuit's decision in the instant case. The employees in *Darden* were previously laid off employees who had been recalled for employment. *Id.* at

1117-18. The employees claimed that at the time of their recall interview, agents of the employer induced them to take jobs with the company by making statements to the effect that the employer had enough work to guarantee their employment for at least ten years. *Id.* Thus, when the employees were laid off three years after being rehired, they asserted claims against the employer for breach of an oral employment agreement for definite duration and fraudulent misrepresentation in state court. The cases were removed to federal district court where summary judgment was granted in favor of the employer. *Id.*

During their employment, the employees were covered by a comprehensive labor agreement that "govern[ed] such subjects as rates of pay, hours of work, seniority, layoffs, reductions in force, terminations, severance pay, complaints, grievances and arbitration." *Id.* Additionally, the labor agreement included a mandatory grievance and arbitration procedure to settle disputes between the employees and the company. *Id.*

On appeal, the Eleventh Circuit noted that:

> [W]hile individual contracts between employer and employee are not precluded by the existence of a collective bargaining agreement, to the extent that an individual contract and a collective bargaining agreement are inconsistent, the latter must prevail.

Id. at 1120 (citing *Eitmann*, 730 F.2d at 362). Accordingly, the Eleventh Circuit affirmed the judgment of the district court in dismissing the employees' complaint.

Here, as in *Darden*, Petitioner was covered by a comprehensive labor agreement that detailed such subjects as rates of pay, hours of work, seniority, layoffs, reductions in force, multiemployer plan contributions, terminations, grievances and arbitration. As in *Darden*, the "independent agreement" that Petitioner sought to enforce was inconsistent with, indeed, "subtracted from" the labor agreement. Consistent with this Court's decisions and the Eleventh Circuit's decision in *Darden*, the Ninth Circuit here, under these similar circumstances, correctly concluded that "the CBA controls." *Beals*, 114 F.3d at 894.

CONCLUSION

Certiorari review of this case is not warranted and should be rejected. The Petition for a Writ of Certiorari does not present a substantial and unique issue in federal labor law that requires this Court's guidance and clarification. The Ninth Circuit's decision properly followed *Caterpillar* and *J.I. Case*, which provide clear guidance regarding preemption under § 301 when adjudication of the state contract claim substantially depends on an interpretation of the CBA and the contract upon which an employee bases his claim is subsumed by the CBA. Further, the Ninth Circuit's decision in this case is consistent with the Third and Eighth Circuits' decisions, as these cases are factually dissimilar.

The Court should, accordingly, deny the Petition for a Writ of Certiorari. January 8, 1998.

Respectfully submitted,

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